Filed 3/29/10 P. v. Lopez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CRUZ SOTO LOPEZ, Defendant and Appellant.	B212781 (Los Angeles County Super. Ct. No. KA076786)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

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Cruz Soto Lopez appeals from the judgment entered upon his convictions by jury of one count of first degree murder (Pen. Code, § 187, subd. (a), count 1),[1] two counts of second degree robbery (§ 211, counts 2 & 5) and 14 counts of assault with a firearm (§ 245, subd. (a)(2), counts 6, 8–12, 15, 17–21 & 23–24).[2] The jury found to be true as to count 1 the special circumstance allegation that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)), as to counts 1, 2 and 5, the firearm enhancement allegations within the meaning of section 12022.53, subdivisions (b), (c) and (d), as to counts 6, 8 through 12, 15, 17 through 21, 23 and 24, the personal use of a firearm allegation within the meaning of section 12022.5, subdivision (a), and as to count 18, the allegation that appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The trial court sentenced appellant to an aggregate state prison term of life without parole plus 79 years to life. Appellant contends that (1) the trial court erred by failing to instruct the jury on the lesser included offense of manslaughter, (2) the trial court deprived him of due process and a fair trial by failing to instruct the jury on self-defense by an aggressor, and (3) spectator misconduct deprived him of his rights to a fair trial and trial by an impartial jury in violation of the state and federal Constitutions.

We affirm.

FACTUAL BACKGROUND

On the evening of October 17, 2006, Filiberto Moreno (Filiberto) and his brother, Sabas Moreno (Sabas), were playing basketball with a group of 15 to 17 others at Solis Park, in Baldwin Park. Most of the individuals were on the court playing, and the rest were sitting on a wall at the side of the court waiting to play.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Appellant's convictions resulted from his retrial after a mistrial. On the People's motion, counts 3, 4, 7, 13, 14, 16 and 22 were dismissed in the interests of justice pursuant to section 1385.

Suddenly, one of the players yelled that their property, which had been left at the side of the court, was being stolen. Filiberto turned and saw a person, subsequently identified as appellant, acting as a lookout and pointing a rifle at people, while another person was taking wallets and cell phones. Both perpetrators had hoods on their heads, so Filiberto did not see either man's face. Rotating like a turret, appellant began firing 12 to 22 shots in the direction of the players on the court. Everyone dropped to the ground.

When the shooting stopped, someone yelled that appellant "has no more bullets. Let's grab him." Someone else yelled that it sounded like a fake gun. Appellant and his companion ran, chased by the basketball players, seeking to get their property back. Filiberto was closest to the perpetrators. As appellant ran, his hood came off. Filiberto and his nephew, Eder Ojeda (Ojeda), saw a distinctive scar on the back of appellant's head. Filiberto saw appellant's face when appellant turned and shot him in the leg with the rifle. Though Filiberto could not see him well, he recognized him.

After Filiberto was shot, Sabas and the other men continued the chase. Appellant then shot Sabas in the chest, killing him with that single gunshot. Appellant and his companion escaped.

Detectives Dameron Peyton and his partner, Kevin Lowe, arrived at the crime scene where Detective Peyton interviewed 18 witnesses, all but one of whom said that there was only one shooter. Ojeda described a distinctive scar, with a hook at the end, on the back of appellant's head, which led Ojeda to recall that he knew appellant as "Cruz" from elementary school. Ojeda later identified appellant from a school photograph shown to him by the detectives.

Lauro Moreno (Lauro), Filiberto and Sabas' brother, who was on the court playing at the time of the robbery, was shown several six-packs. One contained a photograph of appellant and another contained a photograph of Anthony Villalba (Villalba). Lauro identified Villalba as the person taking the property. He did not select anyone else.[3]

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[3] Filiberto, Ojeda and Lauro identified appellant as the shooter at trial.

Six .22-caliber rifle shell casings were recovered at the shooting scene and a .22-caliber bullet was removed from Sabas's body during an autopsy.

On the night following the shooting, appellant's cousin, Officer Crystal Renteria, received a call from appellant. He asked her who they were looking for at the park. Officer Renteria asked appellant if he knew anything about it. He answered affirmatively, stating that his companion took property, and tried to run away, during which shots were fired. Appellant admitted shooting once because he was in fear with everyone running towards him in the dark. Officer Renteria then called the police dispatcher and asked who the police were looking for relating to the park shooting. When told they were looking for appellant, she advised the dispatcher he had just called her.

A warrant was issued for appellant's arrest. He turned himself in on October 31, 2006, after Villalba had already been arrested. In custody, Detectives Peyton and Lowe *Mirandized* appellant, interviewed him and recorded the conversation. Appellant gave several disjointed versions of the incident. He initially denied involvement, claiming that he was with his girlfriend at a fast food restaurant at the time of the shooting and that Villalba was responsible for the shooting. Appellant later admitted meeting Villalba at the park, carrying a .22-caliber rifle in his pants, and shooting it into the air twice to frighten off the men near the basketball court. Later in the interview, appellant said he did not intentionally shoot anyone, but the rifle must have gone off as he was running. In yet another version, he reported that Villalba took the rifle from him and shot the second victim to death. Near the end of the interview, appellant reverted to his first story, denying that he shot anyone and that he was at the park. He said that "I made up a story to see how you guys react." He turned himself in because he did not want to "go down" for something Villalba did.

Appellant testified at trial on his own behalf. He admitted making a number of inconsistent statements to detectives and at his previous trial. He denied being at the park at the time of the shooting and denied calling his cousin, Officer Renteria, the next

evening about the shooting. He said that the police threatened that if he did not tell them what they wanted, his girlfriend would go to jail.

At appellant's first trial, he testified that he met Villalba at the park. He also testified that he probably told detectives that he had a .22-caliber rifle in his clothing, but was simply telling them what they wanted to hear.

After his arrest, appellant wrote a letter to Villalba telling him that they would fight this case together. The letter stated, "We got to get these people not to come into court."

DISCUSSION

I. Failure to instruct on manslaughter as a lesser included offense

Appellant was charged with the murder of Sabas, with the special circumstance that it occurred during the commission of a robbery. He contends that the trial court committed reversible error in failing to instruct the jury on the lesser included offense of manslaughter. He argues that "[a]fter his participation in a robbery in a park, appellant ran from the scene, whereupon 20 or so men who were the victims of both the robbery and assault with a firearm ran after appellant in an apparent attempt to extract revenge. It was dark [and] appellant was being pursued by an angry mob. . . . [H]e fired his weapon [as he ran] because he feared for his life." He claims that this constitutes substantial evidence requiring the manslaughter instruction based upon a theory of imperfect self-defense. This contention is without merit.

In criminal cases, """even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.""" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*); *People v. Najera* (2008) 43 Cal.4th 1132, 1136.) This obligation includes giving instructions sua sponte on lesser included offenses when the evidence raises a question whether all of the elements of the charged offense are present (*Breverman*,

supra, at pp. 148–149, 154) and the lesser included offense is supported by the evidence. (*Id*. at p. 159.)

Manslaughter is "'the unlawful killing of a human being without malice.' (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense."'" (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) A conviction of manslaughter based on unreasonable or imperfect self-defense requires the defendant to have an actual, if unreasonable, belief that he or she was in imminent danger to life or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Flannel* (1979) 25 Cal.3d 668, 674, 679.) In such circumstances, the defendant is deemed to have acted without malice and cannot be convicted of murder but only of manslaughter. (*People v. Flannel*, *supra*, at pp. 674, 679.)

Voluntary manslaughter is a lesser included offense of first degree murder. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 443; *People v. Cole* (2004) 33 Cal.4th 1158, 1215.) As a result, whether or not requested, the trial court is required to instruct on voluntary manslaughter if there is substantial evidence to support it. (See *Breverman*, *supra*, 19 Cal.4th at p. 162.) We independently determine whether instruction on unreasonable self-defense was required. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

Imperfect self-defense cannot be invoked by a defendant who, through his own wrongful conduct, such as initiation of a physical assault or commission of a felony, has created the circumstances under which his adversary's attack or pursuit is legally justified. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 ["[T]he imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense"]; *People v. Seaton* (2001) 26 Cal.4th 598, 664 ["Because, however, defendant's testimony showed him to be the initial aggressor and the victim's response legally justified, defendant could not rely on unreasonable self-defense as a

ground for voluntary manslaughter"]; see also *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 ["A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion"].) But the defense is available to the defendant if the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led to the use of force. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180.)

The evidence does not support imperfect self-defense here. Appellant initiated the contact by assaulting his victims at gunpoint, while his companion took their wallets and cell phones. Appellant then began shooting wildly, unloading as many as 20 or more shots. He could not avail himself of imperfect self-defense, as his felonious conduct set in motion circumstances rendering the group of ballplayers response in chasing him legally justified for multiple reasons.

A person is privileged to use any necessary force to protect or defend the person's property so long as the force used is no more than that which reasonably appears necessary in view of all of the circumstances of the case. (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 730, disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19; see also § 197.) While appellant argues that he had disengaged from the victims and made a "clear, quick and unequivocal retreat by appellant . . . extinguish[ing] any justification for the attack on appellant by Sabas and the other men," he ignores that he made his retreat with his victim's property.[4] Thus, the basketball group was lawfully entitled to pursue appellant to attempt to retrieve their property by use of reasonable force. (See *People v. Randle* (2005) 35 Cal.4th 987, 1002

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[4] The concept of unequivocal retreat has no application in the context of a robbery, as opposed to a physical assault, for two reasons. First, while the perpetrator can leave the scene in a physical sense, he or she continues to perpetrate the offense until he or she reaches a place of temporary safety. Second, unlike the retreat from a physical altercation, the "retreating" robber brings with him the booty from his wrongdoing.

[retreat and subsequent recovery of stolen property from defendant extinguished the legal justification for attacking the defendant], disapproved on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

In addition to having a right to attempt to recover their property, the victims may also have had a lawful right to attempt to effectuate a citizen's arrest of appellant. (*People v. Randle, supra,* 35 Cal.4th at p. 1002, fn. 5; §§ 835, 837; *People v. Fosselman* (1983) 33 Cal.3d 572, 579 ["A citizen may arrest another if a felony has in fact been committed and he has reasonable cause to believe that the person to be arrested committed it"].) Appellant had just committed an assault with a firearm and robbed numerous victims of their property at gunpoint, felonies justifying a citizen's arrest.

Appellant's claims that his pursuers intended to "exact revenge" and "likely intend[ed] to inflict serious harm" are pure speculation. There was no evidence that the victims were going to use excessive force. Filiberto testified that they ran after appellant, intending "[t]o get our stuff back." One of the basketball players yelled, "Let's grab him." He did not yell that they should kill or hurt him. There was no evidence of any conduct by the victims which would have undermined their privilege to pursue appellant. When Filiberto and Sabas were shot, the basketball players were still acting lawfully.

An instruction on manslaughter was unnecessary for another reason. A robbery remains in progress until the perpetrator has reached a place of temporary safety. (*People v. Carroll* (1970) 1 Cal.3d 581, 585.) While fleeing the scene and being pursued, robbers have not found their way, even momentarily, to a place of temporary safety. (*People v. Boss* (1930) 210 Cal. 245, 250–251; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 189, fn. 3.) Appellant had not completed his robbery at the time he shot Sabas. He had just robbed the basketball players, shot numerous bullets at them and began running when the players chased him. He had not yet reached a place of temporary safety. A killing committed by a robber during his flight from the scene of the crime, before reaching a place of temporary safety, constitutes felony murder, not manslaughter. (*People v. Pulido* (1997) 15 Cal.4th 713, 723, fn. 3.)

Even if the trial court erred in failing to instruct on the lesser included offense of voluntary manslaughter, it is not reasonably probable that absent that error the result would have been more favorable to defendant. (*Breverman*, *supra*, 19 Cal.4th at p. 165 [the failure to instruct on a lesser included offense in a noncapital case is evaluated under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836].) The evidence against defendant was overwhelming. Filiberto and Ojeda both said that they saw appellant's face when he turned and shot at Filiberto. Both also identified the unique scar that appellant had on the back of his head, which they saw when his hood flew off as he ran. Ojeda went further, telling officers that he recognized appellant, who had gone to elementary school with him. Appellant was the only person seen with a firearm. At one point in his statement to police, appellant admitted being present at the shooting, having the rifle in his pants and shooting it at least once. Appellant's cousin, a police officer, testified to receiving a phone call from appellant the night after the shootings to inquire who was being sought for the murder.

II. Failure to instruct on self-defense by an aggressor

Appellant contends that the trial court erred and deprived him of due process and a fair trial by failing to instruct the jury on self-defense by an aggressor under CALJIC No. 5.54[5] or CALCRIM No. 3471.[6] He argues that there was substantial evidence that, while

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5 CALJIC No. 5.54, states: "The right of self-defense is only available to a person who initiated an assault, if [¶] [[1.] [He] [She] has done all the following: [¶] A. [He] [She] has actually tried, in good faith, to refuse to continue fighting; [¶] B. [He] [She] has by words or conduct caused [his] [her] opponent to be aware, as a reasonable person, that [he] [she] wants to stop fighting; and [¶] C. [He] [She] has by words or conduct caused [his] [her] opponent to be aware, as a reasonable person, that [he] [she] has stopped fighting. [¶] After [he] [she] has done these three things, [he] [she] has the right to self-defense if [his] [her] opponent continues to fight[.]] [, or] [¶] [[2.] [if] [T][t]he victim of simple assault responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense.]"

6 CALCRIM No. 3471 states: "A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if: [¶] 1. (He/She) actually and in

he may have been the person who initiated the assault on the basketball players, he had abandoned the assault and ran from the scene, at which point the victims became the aggressors. Appellant told Officer Renteria that he feared for his life and fired while running. This contention lacks merit.

Self-defense justifies acts that are otherwise criminal when the defendant has an "'honest and *reasonable* belief'" that he or she is in "imminent" danger of "'bodily injury.'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064; see also §§ 197, subds. 1 & 3, 693.) To justify a homicide under a plea of self-defense, it must appear not only that the defendant actually believed himself in deadly peril, but that as a reasonable man he had sufficient grounds for his belief. (*People v. Williams* (1977) 75 Cal.App.3d 731, 739.) But, as is the case with imperfect self-defense, perfect self-defense cannot be asserted if the perpetrator set in motion the circumstances that led to the victim's lawful response. As stated in *People v. Christian*, *supra*, 7 Cal.4th at page 773, footnote 1: "It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." The analysis in part I, *ante*, is therefore applicable here.

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good faith tries to stop fighting; [¶] [AND] [¶] 2. (He/She) indicates, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wants to stop fighting and that (he/she) has stopped fighting(;/.) [¶] <*Give element 3 in cases of mutual combat.*> [¶] [AND [¶] 3. (He/She) gives (his/her) opponent a chance to stop fighting.] [¶] If a person meets these requirements, (he/she) then has a right to self-defense if the opponent continues to fight. [¶] [A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose.] [¶] [If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting.]"

Further, the language of the instructions that appellant contends were required makes clear that they are applicable where the offense is a physical assault, not, as here, a robbery.

Even if the trial court erred in failing to instruct on self-defense by an aggressor, that error was harmless, as discussed in part I, *ante.*[7]

III. Spectator misconduct

Five members of Sabas's family entered the courtroom in the middle of the reading of jury instructions wearing T-shirts depicting a large photograph of Sabas and a memorial inscription. The trial court saw the photographs and stated: "Let the record reflect the family walked in five seconds ago. Ladies and Gentlemen, step into the jury room for a moment. In the meantime, don't talk about the case, don't form or express any opinions about it."

After the jury had left the courtroom, the trial court asked if the people who had just entered the courtroom had T-shirts on that had anything to do with the case. Defense counsel stated, "There are five T-shirts, Judge, of the six that walked in have pictures of the deceased." The trial court described the T-shirts, stating, "It says Sabas Moreno, and there's numbers. Okay, I see. It's got his date of birth and the date of the commission of the murder and—[PROSECUTOR]: The words in Spanish on the top say, 'Rest in Peace.' [COURT]: Okay. So it's a large photograph of Mr. Moreno in life, you know, his torso, smiling, smiling face, then some words in Spanish that apparently mean rest in peace. His name, the dates that I've referred to, 3/16/77 to 1/17/06. Then there's some other words I can't see. What is that. [PROSECUTOR]: This is, 'You're always in our hearts.' [COURT]: That's in Spanish, as well." The trial court explained to the spectators that they could not wear the T-shirts because it might jeopardize any convictions the jury might reach and that, "We don't let people come in and do that, not

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[7] Because we conclude that there was no basis for instructing the jury on self-defense by an aggressor, we necessarily conclude that appellant did not suffer ineffective assistance of counsel by reason of his attorney's failure to request such an instruction.

in the courtroom in front of the jury. Just can't do it. It's trying to communicate something to the jury, and that's what the Court of Appeal is going to think."

Defense counsel moved for a mistrial, arguing that the damage was done. The T-shirts were designed to evoke sympathy on behalf of the victim. The jury would likely recognize the T-shirt wearers as family members because they were present during the testimony of the witness relatives.

The trial court questioned whether the jury saw anything, as they were paying attention to the court giving instructions when the relatives entered. Though the trial court acknowledged that it was possible the jury saw the T-shirts, it nonetheless denied the mistrial because even if a juror saw the T-shirt, it was very brief, and the T-shirt did not impart anything that the jury did not already know.

When the jury reentered the courtroom, the trial court asked if anyone had seen the T-shirts. Only one juror stated that he or she did. The trial court admonished the juror to "disregard what you saw." It was not evidence and had nothing to do with the case. The trial court advised the jurors that the admonition applied to each one of them and asked if any juror had doubts about his or her ability to go forward fairly to both sides. Not seeing any hands raised, the trial court continued instructing the jury.

Appellant contends that wearing the T-shirts in the courtroom was prejudicial spectator misconduct. He argues that it was tantamount to the jury receiving evidence outside the trial and made the spectators witnesses who were not subject to cross-examination. This, he claims, deprived him of a fair trial by an impartial jury in violation of the California Constitution and the Sixth and Fourteenth Amendments to the federal Constitution. This contention is without merit.

"Spectator misconduct is a ground for mistrial if it is 'of such a character as to prejudice the defendant or influence the verdict.'" (*People v. Chatman* (2006) 38 Cal.4th 344, 368–369; *People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) The trial court has broad discretion in determining whether such misconduct is prejudicial. (*People v. Lucero, supra,* at p. 1022.) "Whether a particular incident is incurably prejudicial requires a nuanced, fact-based analysis. The trial court is entrusted with broad discretion in ruling

on mistrial motions." (*People v. Chatman*, *supra*, at pp. 369–370.) Prejudice is not presumed (*People v. Hill* (1992) 3 Cal.4th 959, 1002, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), and no California case has been reversed for spectator misconduct. (*People v. Lucero* at p. 1023, fn. 10.)

The trial court did not abuse its broad discretion here. The five spectators entered the courtroom wearing T-shirts with a photograph on them of Sabas while he was alive, along with the words "rest in peace" and "you're always in our hearts." A photograph of Sabas when he was alive had already been introduced into evidence. The fact that relatives and friends wearing the T-shirts would indicate that they missed him would come as no surprise to the jury. Consequently, the T-shirts did not impart any information to the jury that was not already in the record.

Furthermore, even the trial court, attuned to monitor what was occurring in the courtroom, could not tell exactly what was on the T-shirts. The T-shirts were exposed for only seconds before the trial court sent the jury to the jury room so that it could deal with the issue. The trial court then had each of the spectators remove or cover the T-shirts. When the jurors returned to the courtroom, the trial court determined that only one juror had seen the T-shirts, and it admonished him or her and the rest of the jury to "disregard what you saw." It also asked if any juror doubted that he or she had the ability to be fair to both sides, and no one indicated such doubt. These admonitions were sufficient to mitigate prejudice from the misconduct, if any.

People v. Houston (2005) 130 Cal.App.4th 279 is instructive. There, the defendant contended on appeal that his rights to due process and a fair trial were violated by spectators wearing buttons and placards bearing the victim's likeness in the courtroom. (*Id.* at p. 309.) The trial court allowed the spectators to wear the buttons but admonished the jury that the buttons were not evidence and the jury should not consider them for any purpose. (*Ibid.*) The trial court repeated the admonition again during closing arguments, and defense counsel commented that friends and relatives were in the courtroom and reiterated the court's admonition. (*Id.* at pp. 309–310.) The Court of

Appeal concluded that the two admonitions were sufficient to cure any inherent prejudice presented by the button display. (*Id.* at pp. 311–313.)

Even if it was error not to grant appellant's request for a mistrial, for the reasons discussed in part I, *ante*, the error was harmless under even the most stringent beyond-a-reasonable-doubt standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Also, the jury was instructed that its decision must be based on the facts and the law, the facts are to be proved from the evidence, it is not to decide the case based on sympathy or prejudice (CALJIC No. 1.00), and it was to "decide all questions of fact in this case from the evidence received in this trial and not from any other source" (CALJIC No. 1.03). We presume the jury followed the instruction. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST